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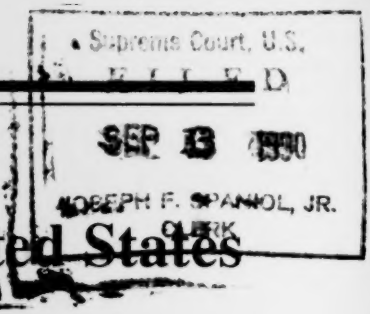

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES BIAS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LEONARD KEVIN BIAS, DECEASED,

Petitioner,

v.

ADVANTAGE INTERNATIONAL, INC. AND A. LEE FENTRESS

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether evidence tending to show the bias, self-interest and lack of credibility of movants' sole evidence in support of its motion for summary judgment is sufficient to create a genuine issue of material fact.

II. Whether Rule 56 of the Federal Rules of Civil Procedure requires a non-moving party, which will not bear the burden of proof at trial, to produce direct rebuttal evidence to controvert movants' affidavits or whether circumstantial evidence can satisfy non-movant's burden.

III. Whether Rule 56 of the Federal Rules of Civil Procedure permits courts to

consider matters not raised or briefed by any of the parties below.

IV. Whether, if viewed in a light most favorable to non-movant, the results of numerous drug tests showing no trace of cocaine in Bias' system is sufficient to rebut testimonial evidence that he was a cocaine user.

V. Whether summary judgment is proper when movant offers only opinion evidence to support an essential element on which it will bear the burden of proof at trial.

VI. Whether Rule 56 of the Federal Rules of Civil Procedure permits a trial court to find, as a matter of law, that it is not feasible to negotiate

and complete an enforceable endorsement contract in one day.

VII. Whether Rule 56 of the Federal Rules of Civil Procedure permits a trial court to find, as a matter of law, that an agent's breach of loyalty and conflict of interest does not affect his ability to complete an enforceable endorsement contract in one day.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit (No. 89-7116) were Petitioner, James Bias, as personal representative of the Estate of Leonard Kevin Bias, Deceased, and Respondents, Advantage International, Inc. and A. Lee Fentress.

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SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1990

JAMES BIAS, as Personal Representative of the Estate of LEONARD KEVIN BIAS, Deceased

Petitioner,

v.

ADVANTAGE INTERNATIONAL, INC. and A. LEE FENTRESS

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

James Bias, personal representative of the Estate of Leonard Kevin Bias, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 905 F.2d 1558 and appears as Appendix A to this petition.

The District Court's ruling granting summary judgment to Respondents is unreported. The District Court's Order appears as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 15, 1990. This petition for a Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1). The original action was brought by Petitioner in the Superior Court for the District of Columbia. The

case was removed to the District Court for the District of Columbia by Defendants. The jurisdiction of the District Court was invoked under 28 U.S.C. 1332 because of diversity of citizenship, the Petitioner being a resident of Maryland, Respondents being residents of the District of Columbia, and Fidelity Security Life Insurance Company and Reebok International, Inc. being residents of Missouri and Massachusetts, respectively.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

This case involves the Seventh Amendment to the Constitution of the United States ("7th Amendment") and Rule 56 of the Federal Rules of Civil Procedure ("Rule 56). The 7th Amendment and Rule 56 are set forth in Appendix C.

STATEMENT OF THE CASE

From 1982 through 1986, Leonard Kevin Bias ("Len Bias") was a star basketball player for the University of Maryland. In the Spring of 1986, he entered into an agency relationship with Respondents, Advantage International Inc. ("Advantage") and A. Lee Fentress ("Fentress")(collectively, the "Defendants"). The Defendants agreed to act exclusively as Len Bias' personal agent, financial advisor and attorney. For their services Advantage and Fentress were to receive a percentage of Len Bias' earnings.

As part of their agency, the Defendants agreed to obtain for Len Bias a One Million Dollar ($1,000,000.00) life insurance policy. Subsequently, Fentress represented that he had secured the desired insurance coverage.

On June 17, 1986, the Boston Celtics drafted Len Bias as the second pick in the National Basketball Association ("N.B.A.") collegiate draft. Advantage and Fentress were responsible for negotiating certain contracts on his behalf, including basketball and product endorsement contracts. Prior to the N.B.A. draft, Reebok International Ltd. ("Reebok") expressed its desire to contract with Len Bias for his endorsement of their athletic shoes. Len Bias also desired a Reebok contract.

On June 18, 1986, the Defendants engaged in negotiations with Reebok for the desired endorsement contract. Reebok presented a form endorsement contract which Len Bias expressed to Fentress that he was willing to execute on that day. This form contract provided for an unconditional lump sum payment to be paid

at the execution of the contract. However, after sending Len Bias and his father from the room, Advantage and Fentress breached their duty of loyalty and negotiated with Reebok on behalf of other clients. Because Defendants had diverted the negotiations, they were unable to secure an contract on that day. To conceal their actions and breaches of fiduciary duty, Advantage and Fentress misrepresented to Len Bias that an enforceable endorsement contract had been completed, and, in fact, relayed to Bias and his father the terms of the contract.

One day later, in the early morning of June 19, 1986, Len Bias died as a result of cocaine intoxication. It was discovered soon after Len Bias' death that, despite their representations, the Defendants had not secured the life insurance policy. It was also discovered

that, despite their representations, the Defendants had failed to complete an enforceable Reebok endorsement contract.

James Bias, personal representative of his son's estate ("the Estate"), brought suit against Advantage and Fentress alleging, inter alia, breach of contract, breach of fiduciary duty, negligence, fraud and negligent misrepresentation.[1] A jury trial was prayed.

The Defendants moved for summary judgment and alleged that, as a matter of law, Len Bias was an uninsurable cocaine user. The Defendants argued, therefore, that they were not liable for their failure to secure a life insurance policy

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[1] **The Estate also brought suit against Fidelity Security Life Insurance Company ("Fidelity") and Reebok. The District Court awarded summary judgment to both Fidelity and Reebok; Petitioner did not appeal these judgments.**

regardless of their agreement to do so. Further, the Defendants argued that they were not liable for their breaches of fiduciary duty and conflict of interest, it was not reasonable to expect that such an agreement could have been completed on the same day negotiations were held.

With regard to the insurance issue, the Defendants offered the testimony of Terry Long and David Gregg, admitted cocaine users, who stated that Len Bias used cocaine on various, yet unspecified, occasions prior to his death. The Estate showed, however, that Long and Gregg had altered their testimony regarding Bias' alleged drug use in order to obtain immunity from criminal prosecution. Upon cross-examination at the trial of Brian Tribble, Long and Gregg themselves admitted the calculated change in their testimony. Portions of the Brian Tribble

trial transcript reflecting the cross-examination of Long and Gregg are attached hereto as Appendix D and E, respectively.[2]

In further rebuttal of this patently unreliable and self-interested testimony, the Estate offered the Affidavits of Len Bias' mother and father and his collegiate basketball coach, Charles "Lefty" Driesell, who testified as to their close relationship with Len Bias and their knowledge that Len Bias did not use drugs. Further, the Estate introduced the results of drug tests administered by the University of Maryland, Boston Celtics and New York

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[2] **The appended portions of trial testimony were not part of the record before the United States Court of Appeals for the District of Columbia Circuit though other portions of the Long and Gregg testimony were a part of the record. The testimony appended hereto is intended to be purely a reflection of those arguments raised below by the Estate.**

Knickerbockers which conclusively establish that Len Bias was completely free of drugs from 1982 to the time of his death.

Judge Revercomb of the U.S. District Court for the District of Columbia granted the Defendants' Motion for Summary Judgment by an Order dated November 8, 1988 (hereinafter, the "Order"). Appendix B. The District Court held, as a matter of law, that Len Bias was a cocaine user and that, without exception, cocaine users are uninsurable. Appendix B at pp. 27-31. Further, the Court found, as a matter of law, that Fentress and Advantage could not have obtained a written contract with Reebok prior to Bias' death. Appendix B at pp. 31-32.[3]

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[3] The District Court also held that Fentress acted only in an official capacity as an officer of Advantage and therefore could not be

THE DECISION BELOW

On appeal, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") affirmed the Order. The Court determined that the Defendants had met their affirmative burden by offering the testimony of Terry Long and David Gregg. The D.C. Circuit held that the Estate, as non-movant, was then required to rebut Defendants' showing with direct evidence; the circumstantial evidence of Bias' parents and coach was held insufficient. The D.C. Circuit advised that

> rebuttal testimony either must come from persons familiar with the particular events to which the defendants' witnesses testified ...

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personally liable for his actions. Appendix B at p. 32-34. The Estate appealed this issue as well to United States Court of Appeals for the District of Columbia Circuit. The District of Columbia Circuit, having affirmed the grant of summary judgment on the other issues, did not address the issue of Fentress' personal liability.

905 F.2d at 1561; Appendix A at p. 13. Further, the D.C. Circuit dismissed the results of the drug tests offered by the Estate.

> The drug test results offered by the Estate may show that Bias had no cocaine in his system on the dates when the tests were administered, but, as the District Court correctly noted, these tests speak only to Bias' abstention during the period preceding the tests.

905 F.2d at 1561-62; Appendix A at pp. 15-16. The D.C. Circuit, therefore, affirmed that the Estate had failed to sufficiently rebut the testimony of Long and Gregg.

Having affirmed that Bias was, as a matter of law, a cocaine user, the D.C. Circuit further affirmed the District Court's determination that in 1986 no life insurance policy was available to cocaine users. Appendix A at pp. 17-21. The Defendants' sole evidence in support

of this essential element of their uninsurability claim was the opinion testimony of two experts. The D.C. Circuit acknowledged that in rebuttal the Estate offered the testimony of its own experts in rebuttal, but the Court held that the Estate failed to meet its burden to show the existence of any insurance company which would have issue a life insurance policy to a drug user. Appendix A at pp. 17-21.

With regard to the Reebok contract issue, the D.C. Circuit affirmed that it is not feasible for an enforceable endorsement to be negotiated and completed in one day. Appendix A at pp. 22-23. The Court held that even if the defendants breached their fiduciary duties and maintained a conflict of interest, a jury could not reasonably find that the defendants' actions

affected the feasibility of completing an enforceable endorsement contract on June 18, 1990. Appendix A at pp. 22-23.

REASONS FOR GRANTING THE PETITION

This is the paramount case dealing with the application of summary judgment procedure when the moving party will bear the burden of proof at trial. The trilogy of cases generally considered the cornerstones of summary judgment law, Celotex v. Catrett, Anderson v. Liberty Lobby and Matsushita v. Zenith (citations infra), each involved a movant which would not have the burden of proof at trial --- "defensive" use of Rule 56. This Court has not addressed the important subject of summary judgment law from the other side of the fence ---

"offensive" use.[4] Offensive use of Rule 56 is increasingly being utilized, and the lower courts are in dire need of direction from this Court. This case provides the Court with that unique opportunity. Review of this case will permit the Court to generally endorse offensive use of Rule 56, but will allow the Court, through reversal of this summary judgment in this case, to set guideline to protect a non-movant's right to trial.

This case merits the Court's review because the D.C. Circuit's opinion conflicts with the decisions of this

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[4] As Justice Brennan, in his dissent in Anderson v. Liberty Lobby, observed that the Court, through that decision, "change[d] summary judgment procedure for all litigants, regardless of the substantive nature of the underlying action." Though this Court changed summary judgment procedure, the logic and reasoning of those cases left unanswered questions in those cases in which the non-movant will not bear the burden of proof at trial.

Court, the D.C. Circuit and other Circuits and establishes dangerous precedent by:

1) requiring the non-movant to rebut movants' sole evidence though it is shown to be patently unreliable and biased by the self-interests of the witnesses;

2) requiring the non-movant to offer direct, rather than circumstantial, evidence to rebut movants' showings;

3) permitting a court, upon a motion for summary judgment, to consider matters not raised or briefed by any of the parties below;

4) failing to draw all reasonable inferences in favor of the non-movant;

5) granting summary judgment when movants' sole evidence regarding an issue essential to movants' claim is in the form of expert opinion; and

6) infringing upon a litigant's right to a jury trial by removing from the jury serious issues regarding reasonableness, conflicts of interest and fiduciary's duties.

ARGUMENT

I.

THIS CASE PROVIDES THE COURT WITH THE UNIQUE OPPORTUNITY TO RESOLVE CONFLICTS REGARDING OFFENSIVE USE OF SUMMARY JUDGMENT AND THE BURDEN OF THE NON-MOVANT

In 1986 this Court decided three cases, Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) and Celotex Corp. v. Catrett, 477 U.S. 317 (1986), which, read together, crystallized this Court's thoughts regarding application of Rule 56 and the proper inquiry on a motion for summary judgment. Those decisions

analyzed in depth the burden placed on the parties supporting and opposing a motion for summary judgment.

However, each of these decisions, discussed summary judgment procedure in the context of a motion made by the party who will not bear the burden of proof at trial. This may be called "defensive" use of summary judgment. There has been no direction from this Court with regard to summary judgment procedure and the applicable burdens in a context similar to this case, where the movant will bear the burden of proof at trial --- "offensive" use.

The labyrinth of summary judgment procedure in this context is exacerbated, not relieved, by the 1986 opinions. For example, in an oft-quoted portion of the Celotex opinion, the majority stated

> In our view, the plain language of Rule 56(c) mandates the

> entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex, 477 U.S. at 322-323 (emphasis added). It is clear that the ambiguity of these opinions, as they relate to a motion by the party who will bear the burden of proof at trial, led the District Court and D.C. Circuit in this case to place upon the Estate unreasonable and unattainable burdens.

The dichotomy between defensive and offensive use of Rule 56 is significant to the non-movant and its rights to a trial by jury. Defensive use of summary

judgment, when successful, denies the non-movant its cause of action and possibility for a judgment; however, offensive summary judgment thrusts a judgment upon a non-movant without requiring the movant to present his evidence to a jury. The difference is significant. While the legislature may limit or bar a claimant's remedy, such as through a statute of limitations, Sun Oil Co. v. Wortman, 486 U.S. 717, 730 (1988), a defendant's access to a jury when a cause of action is brought against him, maintains the status of a "right" guaranteed by the Seventh Amendment. Appendix C, p. 35.

Offensive summary judgment divests the non-movant of its right to confront and cross-examine the claimant's witnesses; as such, extreme caution should be exercised. This Court must

provide guidance to the lower courts with regard to the application of Rule 56 offensively. Without proper guidance, non-movants may routinely be unjustly denied their 7th Amendment rights and have judgments thrust upon them. The need for guidance is no more evident then in the case at bar where the burdens of the parties and tests of evidence have been so misconstrued as to be in direct conflict with the great weight of authority. While the 1986 trilogy of cases is instructive, the collective analysis from those cases is at best a tenuous fit in the offensive context.

For example, Offensive use of Rule 56 would seem to require the non-movant to prove a negative, a proposition expressly discouraged by the 1986 opinions. The Celotex opinion made it clear that a party must not be required

to produce "affidavits or other similar materials *negating* the opponent's claim," id. 477 U.S. at 323, and yet this is the exact burden placed upon the Estate. The Estate was required to produce affidavits or other similar materials negating the claim of Long and Gregg that Bias had, on unspecified occasions, ingested cocaine. The Court of Appeals even set out the types of evidence it would find acceptable in rebuttal: testimony from "other friends or teammates of Bias who were present at some of the gatherings described by Long and Gregg, who went out with Bias frequently, or who were otherwise familiar with his social habits."

Besides violating nearly every tenet of evidentiary consideration in the summary judgment context, the courts placed upon the Estate an impossible

burden. If the occasions to which Long and Gregg testified did not occur, as argued by the Estate, or if Long, Gregg and Bias were the only persons in attendance at any one of those events[5], then in no case could the Estate meet the burden place upon it by the lower courts.

The burden placed upon the Estate is clearly unsupported by the case law of this Court and the District of Columbia Circuit. It is clear that unless this Court intervenes to correct the misapprehensions regarding offensive use of summary judgment, other non-movants will be unjustly denied their rightful access to the jury. The Estate respectfully requests that this Court

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[5] **The fear is a reality in this case as Mr. Gregg, testifying at the Brian Tribble trial, stated that on the January 1986 occasion (the day unspecified) on which Bias supposedly ingested cocaine, only he (Gregg), Long and Bias were present. Appendix D at p. 151.**

step in now to fill the gaps which persist as a result of the Matsushita, Anderson and Celotex cases.

II.

THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED AN IMPORTANT QUESTION, INVOLVING SUMMARY JUDGMENT PROCEDURE AND THE BURDENS OF THE PARTIES, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. Biased, self-interested movants' evidence demonstrates genuine issue of material fact (Question II)

Evidence, offered by and viewed in a light most favorable to the non-movant, tending to demonstrate the bias, self-interest and lack of credibility of movants' sole evidence in support of its motion for summary judgment is sufficient to create a genuine issue of material fact necessitating trial to a jury. This proposition was supported by this Court in Sartor v. Arkansas Natural Gas Corp.,

321 U.S. 620, reh'g denied 322 U.S. 767 (1944). In Sartor, the defendant moved for a summary judgment and attempted to demonstrate the absence of genuine issue of material fact through the affidavits of eight (8) persons. Id. 321 U.S. at 624. Plaintiff, non-movant, in response raised the issue of movants' witnesses' credibility and showed that each witness had an interest in the outcome of that litigation. Id. 321 U.S. at 626. Drawing on the wisdom of historical Supreme Court opinions, Justice Jackson stated: "[t]he mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." Id. 321 U.S. at 628 (quoting Sonnentheil v. Christian Moerlein Brewing Co., 172 U.S. 401, 408 (1899)); see Aetna L. Ins. Co. v. Ward,

140 U.S. 76 (1891); see also Adickes v. S.H.Kress & Co., 398 U.S. 144, 176 (1970) (Black, J. concurring). Further addressing this issue, the Court observed

> This Court has said: "The jury were the judges of the credibility of the witnesses . . . and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case, such as the one at bar belongs to the jury, who a presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function." [quoting Ward, supra].

Id. at 628. The Court further noted that the importance of confrontation is not

abrogated in the context of summary judgment. "It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony." Id.

This Court reaffirmed the importance of cross-examination in addressing self-interested testimony in Poller v. Columbia Broadcasting Sys., 368 U.S. 464 (1962). In Poller the movant offered the testimony of four (4) interested witnesses; in reversing summary judgment the Court held "[i]t is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by

jury which so long has been the hallmark of 'even-handed justice.'" Id. U.S. at 473.

According to the District of Columbia Circuit's opinion in this case, however, credibility bears no relevance to the summary judgment analysis. 905 F.2d 1562, Appendix A at p. 16. The Estate did more than raise a mere "supposition" regarding Long and Gregg's lack of credibility; it demonstrated, through specific evidence of bias, self-interest and fabrication, that the credibility of those two witnesses, the only evidence offered in support of the motion for summary judgment, is seriously suspect.

The D.C. Circuit's opinion runs afoul of this Court's admonitions in Sartor which noted that "Rule 56 authorizes judgment only where . . . it

is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Sartor, 321 U.S. at 627.

In addition to Sartor, the opinion of the D.C. Circuit in this case is in direct conflict with other decisions of the D.C. Circuit. In National Ass'n of Gov't Employees v. Campbell, 593 F.2d 1023, 1030 (D.C. Cir. 1978), the Court advised "cautious restraint in awarding summary judgment" when movants' sole evidence is the testimony of witness whom are not "totally disinterested."[6] See

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[6] There is also more specific support in this Court and the D.C. Circuit for the proposition that courts should treat with caution testimony given in exchange for immunity from prosecution or leniency. Giglio v. United States, 405 U.S. 150, 154-55 (1972); United States v. Iverson, 637 F.2d 799, 803 (D.C. Cir. 1980). Caution is necessary because a witness seeking immunity or leniency may

also Cellini v. Moss, 232 F.2d 371 (D.C. Cir. 1956); Dewey v. Clark, 180 F.2d 766 (D.C. Cir. 1950); Garrett Biblical Inst. v. American Univ., 163 F.2d 265 (D.C. Cir. 1947).

The D.C. Circuit's opinion in this case is also in direct conflict with decisions in numerous other Circuits, including the Fifth Circuit, Eighth Circuit and Tenth Circuit. The Fifth Circuit is quite clear that issues of credibility of movants' witness, when properly raised, must defeat summary judgment. In Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77 (5th Cir. 1987). The Court stated unequivocally that "[w]hile the mere

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have an interest in giving a false account or in diverting blame from himself by implicating another. Bruton v. United States, 391 U.S. 123, 136 (1968); United States v. Leonard, 494 F.2d 955, 961 (D.C. Cir. 1974); United States v. Lee, 506 F.2d 111, 119 (D.C. Cir. 1974).

claim that an affidavit is perjured is insufficient, where specific facts are alleged that if proven would call the credibility of the moving party's witnesses into doubt, summary judgment is improper." Id. 831 F.2d at 81 (citations omitted). Further, in Taylor v. Bair, 414 F.2d 815, 818 (5th Cir. 1969), the Fifth Circuit analyzed

> In Benoit v. Wilson, supra, the Texas Supreme Court stated:
>
> "The jury is the exclusive judge of the facts proved, the validity of the witnesses and the weight to be given to the testimony. * * * The jury had the sole right to believe all or any part of the petitioner's testimony. It had the right to say, and reasonably so, that from all the facts and circumstances in this case, we, the jury do not believe * * * your testimony * * *." Id., 239 S.W.2d at 796-797.
>
> In addition, [petitioner] being an interested witness brings into play the rules of permissible skepticism.
>
> "As to the testimony of interested witnesses, the general rule is that, while the jury has no right arbitrarily

> to disregard the positive testimony of unimpeached and uncontradicted witnesses, the mere fact that the witness is interested in the result of the suit is sufficient to require the credibility of his testimony to be submitted to the jury. ..." Flack v. First Nat. Bank of Dalhart, 1950, 148 Tex. 495, 226 S.W.2d 628 at 633.

The Eighth Circuit is in accord and equally clear on the issue. Lundeen v. Cordner, 356 F.2d 169, 170 (8th Cir. 1966). In National Aviation Underwriters v. Altus Flying Serv., Inc., 555 F.2d 778, 784 (10th Cir. 1977), the Tenth Circuit held that summary judgment is improper if based on the testimony of an interested party regarding facts known only to him which the court found to be "a situation where demeanor evidence might serve as real evidence to persuade a trier of fact to reject his testimony." (citing Subin v. Goldsmith, 224 F.2d 753 (2d Cir. 1955), cert. denied 350 U.S.

883); accord, Madison v. Deseret Livestock Co., 574 F.2d 1027, 1037 (10th Cir. 1978).[7]

It is undeniable that the D.C. Circuit's opinion in this case stands in direct conflict with this Court's opinion in Sartor, decisions of its own Circuit, and the decisions of numerous other Circuits. It is equally clear that the Estate, through its papers and in argument, revealed specific facts to the District Court and to the D.C. Circuit regarding Long and Gregg's admitted exchange of fabricated testimony for

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[7] Other jurisdictions are in accord. Cameron v. Frances Slocum Bank & Trust Co., 824 F.2d 570 (7th Cir. 1987); Ondato v. Standard Oil Co., 210 F.2d 233 (2d Cir. 1954)(jury must regard, as evidence, the demeanor and appearance of the affiant, and if reasonable, can reject the testimony accordingly); see also Beal v. Lindsay, 468 F.2d 287 (2d Cir. 1972); Transway Fin. Co. v. Gershon, 92 F.R.D. 777 (E.D.N.Y. 1982)(opinion deals only with this issue and resolves that credibility issues regarding movant's witnesses precluded summary judgment).

immunity from prosecution; to ignore this demonstration is to belie the purpose and spirit of summary judgment analysis.

B. Direct versus circumstantial rebuttal evidence (Question I)

In the context of summary judgment, non-movant is not required to produce direct evidence to rebut movants' direct evidence; circumstantial evidence may support inferences which would preclude summary judgment. This proposition is supported by the reasoning and facts of many of this Court's decisions. Anderson, 477 U.S. at 260-261 (1986); Adickes, 398 U.S. at 158 (1970) ("it would be open for the jury ... to infer from the circumstances ..."); Poller, 368 U.S. 464 (1962) (circumstantial evidence raised a genuine issue of material fact in face of direct testimony to the contrary); Theatre Enter. v. Paramount

Distr. Corp., 346 U.S. 537 (1953) (jury may infer agreement from circumstantial evidence); see also Dewey v. Clark, 180 F.2d 766, 773 (D.C. Cir. 1950). The D.C. Circuit, in conflict with this established law, required the Estate to produce direct evidence to rebut the movants' direct evidence. 905 F.2d at 1561-62; Appendix A at pp. 14-16, 19-21. As a consequence, the court improperly ignored the inferences which could reasonably be drawn from the testimony of Bias' parents and coach and the drug test results --- that Len Bias was not a drug user prior to the occasion of his death.[8] The status of movants' evidence

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[8] It must be noted that both the Order of the District Court and the District of Columbia Circuit opinion chastise the Estate for its perceived failure to take the depositions of Terry Long and David Gregg. Appendix A at p. 16; Appendix B at p. 30. Assuming, arguendo, that those individuals could be located for such depositions, it is unclear what the lower courts expect the Estate would have gained by such an exercise.

as "direct" should not affect the inferences which should be drawn from the Estate's circumstantial evidence.

C. Efficiency and results of the drug tests (Questions III and IV)

The trial court, in deciding a motion for summary judgment, may not consider matters not placed before it by the parties to the litigation. Rule 56(c) is clear and complete as to those

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Short of recanted testimony, cross-examination of the deponents regarding the bias and self-interest evident in their testimony would have had no discernible effect on these proceedings. It can be assumed that accusations of fabrication and bias would be denied, and the deposition transcript has no way of recording the demeanor evidence adduced in such an exchange. Further, the Estate should not be denied its litigation strategy decision-making in this regard. As the Second Circuit remarked regarding this issue, the "right to use depositions for discovery does not mean that they are to supplant the right to call and examine the adverse part[ies] . . . before the [trier of fact] ... [W]e cannot very well overestimate the importance of having the witness examined and cross-examined in the presence of the [trier of fact]." Arnstein v. Porter, 154 F.2d 464, 470 (2d Cir. 1946).

materials which may be considered by the trial court in considering a motion for summary judgment: pleadings, depositions, answers to interrogatories, admissions on file and affidavits. Fed. R. Civ. P. 56(c); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 n.16 (1970) The D.C. Circuit's opinion in the case at bar reveals that it, like the District Court before it, considered information, of unknown origin, with regard to the efficiency of the drug test results. 905 F.2d at 1561-1562; Appendix A at pp. 15-16. The D.C. Circuit, in dismissing the drug test results, found that "these tests speak only to Bias' abstention during the periods preceding the tests." The opinion, inexplicably, fails to cite to any evidence, offered by any party, in support of this determination regarding the efficiency of the drug tests.

Neither of the parties, through affidavits or otherwise, addressed the efficiency of the drug test results or the periods of time for those drug tests could detect traces of cocaine. To the extent the lower courts determined this factual issue without benefit of evidence offered by any party to this litigation, it did so in violation of the precepts of Rule 56 and this Court's opinions interpreting that rule. The efficiency of those drug tests is a genuine issue of material fact on which movant offered no evidence.

With regard to the facts, it must be noted that the testimony of Long and Gregg did not specify the dates of the occasions on which they observed Bias ingesting cocaine. Review of the record shows that Long and Gregg, while supposedly recalling numerous such

occasions, could not specify the day, or month, or season, or even year of any such occasion but one. Therefore, the District Court and D.C. Circuit's conclusions that the drug tests administered and supposed occasions of Bias's drug use do not coincide in time are beyond the boundaries of the facts presented. Further, the court's conclusion that the drug tests are efficient only for an unspecified, but relatively short period of time preceding the test defies common sense and the facts of the efficiency of drug tests.

The D.C. Circuit's dismissal of the drug tests results is clearly a violation of its obligation to draw all reasonable inferences in favor of the Estate. Anderson, 477 U.S. at 255; Matsushita, 475 U.S. at 588; Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Practically,

the lower courts were required to infer that it was at least possible that the drug tests rebutted the testimony of Long and Gregg and therefore evidenced a genuine issue of material fact precluding summary judgment. By sua sponte evaluation of the efficiency of the drug tests, and upon its own "evidence", the Court violated the province of the jury in determining the weight and credibility of the evidence placed before it. To the extent such is the law of the D.C. Circuit, it is in direct and unacceptable conflict with federal civil procedure and the decisions of this Court, and, therefore, must be reversed.

D. Opinion evidence regarding availability of jumbo life insurance policy. (Question V)

Summary judgment is improper when the only evidence offered by movant,

regarding an issue on which movant will bear the burden of proof at trial, is in the form of opinion evidence of expert witnesses. This proposition was set forth by this Court in Sartor, 321 U.S. 620. The Court in Sartor stated unequivocally that opinion evidence, even when uncontroverted, is not conclusive and the jury is free to disregard it completely. Id. U.S. at 627.

According to the analysis of the D.C. Circuit in this case, however, the testimony of Defendants' experts regarding the availability, in 1986, of a jumbo life insurance policy for Len Bias, is conclusive evidence of the issue permitting summary judgment. It must be noted that the it is essential to movants' claim of non-insurability that they show (it is their burden) the universal unavailability of such a jumbo

policy. In this case, the only evidence offered of this essential element was the testimony of two "experts", Dr. Francis Achampong and Bernard R. Wolfe; a synopsis of their opinions is set forth in the D.C. Circuit's opinion. 905 F.2d at 1562, Appendix A at pp. 17-19. The D.C. Circuit held the testimony of these experts to be unopposed by the Estate and therefore conclusive on the issue of unavailability. Id. As such, the D.C. Circuit's opinion in this case is in clear conflict with this Court's holding in Sartor.

In addition to Sartor, the opinion is in direct conflict with other decisions of the District of Columbia Circuit. In National Ass'n of Gov't Employees v. Campbell, 593 F.2d 1023 (D.C. Cir. 1978), citing and quoting Sartor, the District of Columbia Circuit

held that summary judgment was inappropriate when an essential element of movants' showing is supported solely by expert opinions. Id. 593 F.2d at 1030 (summary judgment reversed and case remanded for trial).

The court's holding on this issue also contradicts the decisions of numerous other Circuits. e.g. Mims v. United States, 375 F.2d 135, 140 (5th Cir. 1967)(citing Sartor) ("*credibility* and *weight* of expert testimony are for the trier of facts, and that such testimony is ordinarily not conclusive even where it is uncontradicted"). As the decision in this case is in clear and direct conflict with the decisions of this Court, the D.C. Circuit and other Circuits, a Writ of Certiorari should issue, the summary judgment should be reversed and the case remanded for trial.

E. Feasibility of negotiating the reebok contract

The D.C. Circuit addressing the issue of the Reebok negotiations, like those issues related to Bias' alleged drug use, seriously misconstrued the burdens befalling the parties and failed to draw all reasonable inferences in favor of the non-movant, the Estate. As discussed previously, removing these factual issues from the province of the jury, to the extent such action is the law of the D.C. Circuit, is in conflict with the reasoning of the decisions of this Court and other Circuits.

In the case at bar, movant provided some evidence that the negotiations, as conducted on June 18, 1986, could not have produced a final enforceable endorsement contract on that day. Assuming that this evidence meets movants' burden, it is clear that the

Estate offered evidence in rebuttal sufficient to demonstrate a genuine issue of material fact, thereby making summary judgment inappropriate. For example, the Estate offered the testimony of James Bias who stated, under oath, that late in the day of June 18, Fentress represented to them that a contract had been finalized. Further, Reebok's president, Paul Fireman welcomed Len Bias to the "Reebok family." This testimony, that a contract had been finalized, should require the court to draw the reasonable inference that such a contract could have been finalized.

The Estate also offered the testimony of an expert who opined that Fentress breached his fiduciary duties to Bias on June 18th by negotiating with Reebok while maintaining a conflict of interest. The Defendants contend that

this conflict of interest was of no actual consequence, but it is clear that the jury, not the trial court, must be able to determine the facts underlying the negotiations and whether the conflict of interest actually impacted Fentress' ability to secure a contract for Bias.

Finally, the Estate demonstrated the existence of a form Reebok endorsement contract which was presented to Bias at the beginning of the negotiations of June 18th. The jury must also be permitted to weigh this factor on this feasibility issue. The combination of the evidence of Fentress' misrepresentations, his conflict of interest and the role of the form contract clearly demonstrates a genuine issue of material fact as to whether the Defendants breach their fiduciary duties to Bias.

The D.C. Circuit's analysis, resulting in the determination of these issues as a matter of law, is in clear conflict with the decisions of this Court requiring the court to draw all reasonable inferences in favor of the non-movant. Anderson, 477 U.S. at 255. It is clear that this evidence raises more than a metaphysical doubt as to the "infeasibility" of securing an endorsement contract on June 18, 1986. Matsushita, 475 U.S. at 586. To the extent the D.C. Circuit permits the trial courts of its circuit to decide these issues, the law of the Circuit is undeniably in conflict with the reasoning of the decisions of this Court, the other Circuits and the general precepts of summary judgment law. As such, the Writ of Certiorari should issue, the opinion

of the D.C. Circuit must be reversed and this case remanded for trial to a jury.

CONCLUSION

As this Court warned in Sartor, summary judgment is inappropriate unless it is "quite clear what the truth is." Sartor, 321 U.S. at 627. To use Rule 56 otherwise is to "cut litigants off from their right of trial by jury [when] they really have issues to try." Id. The facts and complex issues of this case make it undeniable that it is not "quite clear what the truth is." It is clear that the D.C. Circuit in this case, has improperly denied the Estate its right to trial by jury when it really,a nd rightfully, has issues to try. In that regard, the Writ of Certiorari should issue and the opinion should be reversed and the case remanded for trial.

To the extent the D.C. Circuit's misinterpretations of summary judgment procedure is a consequence of this Court's 1986 opinions, this Court should issue a Writ of Certiorari and settle the ambiguities of those opinions as they relate to an offensive use of Rule 56.

THEREFORE, for all of the reasons set forth above, Petitioner prays that this Court grant its petition and issue of Writ of Certiorari.

respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 13th day of September, 1990, I caused to be hand-delivered the required number of the foregoing Petition for Writ of Certiorari and Appendix to:

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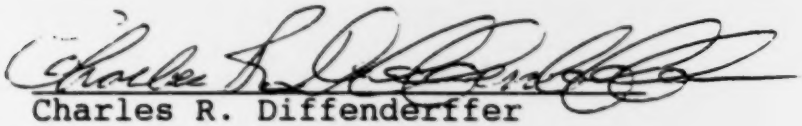

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